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CONFUSING REGULATORY TAKINGS WITH REGULATORY EXACTIONS: THE SUPREME COURT GETS LOST IN THE SWAMP OF *KOONTZ*

ISRAEL PIEDRA *

Abstract: In 2013, the Supreme Court concluded that monetary exactions must be considered with the same judicial scrutiny as land exactions. Land exactions are required contributions from an individual to a government entity in exchange for approval to develop real property. Land exactions proposed by regulatory bodies must be roughly proportional and bear a nexus to the development permit requested, otherwise the exaction constitutes a taking in violation of the Fifth Amendment. In *Koontz v. St. Johns River Management District*, the Supreme Court extended the nexus/rough proportionality test to instances in which government bodies impose monetary conditions on land development. This Comment argues that it was unwise for the Court to apply this strict test to monetary exactions. The Court's holding might create a chilling effect on land use permitting by incentivizing officials to deny development applications to avoid legal risk, rather than attempt to impose appropriate mitigation conditions.

INTRODUCTION

According to EPA estimates, approximately 60,000 acres of wetlands are lost in the United States every year.¹ Wetlands are home to thousands of species of plants and animals, such as water lilies, turtles, alligators, snakes, and migratory birds.² The depletion of wetlands is a result of many factors, including polluted runoff, invasive species, and climate change.³

A wetland is an area “where water covers the soil, or is present either at or near the surface of the soil” for all or most of the year.⁴ Florida is well-known for its plentiful wetlands, most notably the Everglades region in the southern

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¹ ENVTL. PROT. AGENCY, WETLANDS OVERVIEW 2 (2004), available at <http://water.epa.gov/type/wetlands/outreach/upload/overview-pr.pdf> and <http://perma.cc/GD7T-VDQZ>.

² *Id.*

³ See *id.*

⁴ *What Are Wetlands?*, ENVTL. PROT. AGENCY, <http://water.epa.gov/type/wetlands/what.cfm> (last updated Oct. 9, 2012), available at <http://perma.cc/67V6-8YK2>.

portion of the state.⁵ As of 2010, wetlands comprised about thirty percent of the state.⁶ Until 1972, the laws protecting Florida's wetlands were based primarily on common law that had developed throughout the previous centuries.⁷ From 1970 to 1971, however, the state weathered its worst drought in many years, which catalyzed water management reform.⁸

In response, the Florida Legislature enacted the Florida Water Resources Act of 1972, which "established a form of administrative water law that brought all waters of the state under regulatory control."⁹ The Act created five water management districts, each with a governing board vested with broad policymaking power.¹⁰ The governing boards regulate water conservation, allocation, and quality, as well as flood protection, and natural systems management.¹¹

Mitigation proposed by the government was the central controversy in *Koontz v. St. Johns River Water Management District*, in which a Florida water management district board agreed to approve a development permit if the applicant contracted to make improvements to public wetlands several miles away.¹² In 2013, the U.S. Supreme Court held that this required offset must be roughly proportional, and have a nexus, to the proposed development.¹³ This Comment argues that the Supreme Court impermissibly extended the *Nollan/Dolan* test to monetary expenditure conditions because the tests were designed for the specific context of real property exactions.¹⁴

I. FACTS AND PROCEDURAL HISTORY

Coy Koontz, Sr. purchased an undeveloped tract of land near a highway east of Orlando in 1972, the same year that Florida adopted the Water Resources Act.¹⁵ The area of the tract was 14.9 acres and was largely classified as

⁵ See ALBERT C. HINE, GEOLOGY OF FLORIDA 17–18 (2009), available at http://www.cengage.com/custom/enrichment_modules/data/1426628390_Florida-LowRes_watermarked.pdf and <http://perma.cc/9YN8-85MD>.

⁶ Karen Greene, *Tapping the Last Oasis: Florida-Friendly Landscaping and Homeowners' Associations*, 84(5) FLA. B.J. 39, 39 (2010), available at <http://goo.gl/4T04KG> and <http://perma.cc/5PEZ-SXKC>.

⁷ TATIANA BORISOVA & ROY R. CARRIKER, PUBLIC POLICY AND WATER IN FLORIDA 1 (2009), available at <http://edis.ifas.ufl.edu/pdf/files/FE/FE79900.pdf> and <http://perma.cc/S7CD-N8X9>.

⁸ ELIZABETH PURDUM, FLORIDA WATERS 10 (2002), available at <http://www.swfwmd.state.fl.us/publications/files/floridawaters.pdf> and <http://perma.cc/7CM5-64K5>.

⁹ BORISOVA & CARRIKER, *supra* note 7, at 2.

¹⁰ *Id.* at 2–3.

¹¹ PURDUM, *supra* note 8, at 10.

¹² See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2593 (2013). The water management district also provided the applicant with the option to reduce the proposed size of the project and deed the remaining land to the government. *Id.*

¹³ See *id.* at 2603.

¹⁴ See *infra* notes 79–112 and accompanying text.

¹⁵ *Id.* at 2591–92; see BORISOVA & CARRIKER, *supra* note 7, at 2.

wetlands.¹⁶ Commercial developments, residential developments, and road construction surrounded the property, and as a result the tract's value as a wildlife habitat was severely diminished by the time that Koontz decided to develop.¹⁷

In 1984, the Florida legislature passed the Warren S. Henderson Wetlands Protection Act ("Henderson Act") to safeguard the state's expansive wetlands.¹⁸ Under the Henderson Act, prospective developers of wetland property must apply for permits from the district's water management office.¹⁹ A successful permit application must, among other requirements, provide "reasonable assurances that the project is not contrary to the public interest."²⁰ The project permit may be denied as contrary to the public interest if development will adversely affect public health, safety, wildlife conservation, fishing, or navigation.²¹ The Henderson Act provides that permit applicants may offset potential environmental damage by taking mitigating actions to enhance, restore, or preserve other wetlands in the district.²² Either the applicant or the government may supply mitigation proposals.²³

In 1994, Koontz applied to the St. Johns River Management District ("the District") for permits to develop a 3.7-acre portion of his property.²⁴ In an attempt to mitigate the environmental impacts of the project, Koontz offered to deed a conservation easement to the District on eleven acres of his property.²⁵ The District, however, rejected this proposal and instead advanced two alternative options.²⁶ Under the first option, Koontz could reduce the proposed development's size to one acre and deed the District a conservation easement on the remaining 13.9 acres.²⁷ Under the second option, Koontz could proceed with

¹⁶ *Koontz*, 133 S. Ct. at 2591–92.

¹⁷ Brief for Petitioner at 4, *Koontz*, 133 S. Ct. 2586 (No. 11-1447).

¹⁸ See Bruce Wiener & David Dagon, *Wetlands Regulation and Mitigation After the Florida Environmental Reorganization Act of 1993*, 8 J. LAND USE & ENVTL. L. 521, 528 (1993).

¹⁹ *Wetland Resource Permitting Program*, FLA. DEP'T OF ENVTL. PROT., <http://www.dep.state.fl.us/water/wetlands/erp/wetperm.htm> (last updated Sept. 23, 2013), available at <http://perma.cc/EN92-GGP5>. Permits are required for any development that includes "dredging, filling and construction of structures within the landward extent of wetlands and other surface waters." *Id.*

²⁰ *Id.* Other considerations include reasonable assurances that the project will not unacceptably degrade water quality, as well as whether a decision to approve or deny a permit will have a cumulative impact on other projects. *Id.*

²¹ *Id.* Additional factors considered by a district include whether the proposed project adversely affects significant historical resources, causes harmful erosion, or more generally, "[a]dversely affect[s] the . . . relative value of functions performed by the wetlands." *Id.*

²² *Id.* Mitigation is approved at the discretion of the district office. *Id.* Mitigation may not be available in cases involving endangered species or "when there is a likelihood that the mitigation will not be able to successfully create, restore, or enhance a particular wetland." *Id.*

²³ *Id.*

²⁴ *Koontz*, 133 S. Ct. at 2592.

²⁵ *Id.* at 2592–93.

²⁶ *Id.* at 2593.

²⁷ *Id.*

his proposed development of 3.7 acres, deed a conservation easement on the rest of the property as originally proposed, and agree to hire contractors to make improvements several miles away on District-owned wetlands.²⁸

In late 1994, Koontz sued under state law, which allows recovery of damages for agency actions that are unreasonable exercises of state taking power.²⁹ The litigation continued long after Koontz died in 2000.³⁰ First, the Florida trial court dismissed Koontz's suit on the grounds that the case was not yet ripe for adjudication.³¹ In 1998, the intermediate appellate court reversed, and a two-day bench trial resulted on remand.³²

The trial court found that considering Koontz's offer of an eleven-acre conservation easement, the District's demands for offsite improvements amounted to a taking in violation of the Fifth Amendment of the U.S. Constitution.³³ The District attempted to appeal the trial court's decision twice, but the intermediate appellate court dismissed both appeals and concluded that the trial court's orders were not appealable because the decision below was not a final order.³⁴

In 2009, the trial court made a final judgment assigning damages to Koontz, and the intermediate appellate court affirmed.³⁵ The Florida Supreme Court, however, reversed.³⁶ The Florida Supreme Court reasoned that the District *denied* Koontz's application for refusing to agree to the mitigations rather than *approved* his application on the condition that he agree to its demands.³⁷ Furthermore, the court found that because there was a demand for money, rather than for an actual interest in real property, the U.S. Supreme Court's *Nollan/Dolan* test did not apply.³⁸ After the Florida Supreme Court's adverse deci-

²⁸ *Id.* The off-site mitigation involved replacing culverts, plugging ditches, and building a new road on "at least 50 acres" of District-owned wetland property. Brief for Petitioner, *supra* note 17, at 5. The cost of this off-site mitigation could be between \$10,000 and \$150,000. Transcript of Oral Argument at 22, *Koontz*, 133 S. Ct. 2586 (No. 11-1447).

²⁹ See FLA. STAT. ANN. § 373.617(3)(b) (West 2010); Brief for Petitioner, *supra* note 17, at 7.

³⁰ See Brief for Petitioner, *supra* note 17, at 2 n.2. Koontz's estate, represented by his son Coy Koontz, Jr., continued the lawsuit. *Id.*

³¹ *St. Johns River Water Mgmt. Dist. v. Koontz (Koontz V)*, 77 So. 3d 1220, 1223 (Fla. 2011).

³² *Koontz*, 133 S. Ct. at 2593; see *Koontz v. St. Johns River Water Mgmt. Dist. (Koontz I)*, 720 So. 2d 560, 562 (Fla. 5th Dist. Ct. App. 1998).

³³ See *Koontz*, 133 S. Ct. at 2593; see also U.S. CONST. amend. V.

³⁴ See *St. Johns River Water Mgmt. Dist. v. Koontz (Koontz III)*, 908 So. 2d 518, 518 (Fla. 5th Dist. Ct. App. 2005); *St. Johns River Water Mgmt. Dist. v. Koontz (Koontz II)*, 861 So. 2d 1267, 1268 (Fla. 5th Dist. Ct. App. 2003). Although the trial court had assigned liability, it did not assess damages. *Koontz III*, 908 So. 2d at 518.

³⁵ *St. Johns River Water Mgmt. Dist. v. Koontz (Koontz IV)*, 5 So. 3d 8, 8–9 (Fla. 5th Dist. Ct. App. 2009).

³⁶ *Koontz V*, 77 So. 3d at 1231.

³⁷ See *id.* ("Nollan and Dolan were not designed to address the situation where a landowner's challenge is based not on excessive exactions but on a denial of development.").

³⁸ See *id.*

sion, Koontz petitioned the U.S. Supreme Court for a writ of certiorari, which the Court granted in 2012.³⁹

In *Koontz*, the U.S. Supreme Court in 2013 suggested that the fact that no property was actually taken by the District was not determinative.⁴⁰ In rejecting the Florida Supreme Court's holding, the U.S. Supreme Court concluded that because the condition in *Koontz* so heavily burdened the plaintiff's property, the land-use exaction must be examined under the *Nollan/Dolan* standards to determine whether it was a taking.⁴¹

II. LEGAL BACKGROUND

The Takings Clause of the Fifth Amendment to the U.S. Constitution requires that "private property [shall not] be taken for public use, without just compensation."⁴² The clause was inspired by the Magna Carta, which prohibited the taking of land "without some form of due process."⁴³ In 1897, the U.S. Supreme Court used the incorporation doctrine to apply the Takings Clause to the states through the Fourteenth Amendment.⁴⁴ In 1922, the Court decided *Pennsylvania Coal v. Mahon* and held that excessive government regulation of property could amount to a compensable taking.⁴⁵

It took more than fifty years before the Court, in *Penn Central Transportation Co. v. New York City*, delineated the factors determining when government regulations have evolved into a taking.⁴⁶ These factors are (1) the regulation's economic impact on the property, (2) the "extent to which the regulation has interfered with distinct investment-backed expectations," and (3) the character of the government's action.⁴⁷

Later in the twentieth century, the Court articulated a special category of property protection in addition to the excessive property regulation that *Penn Central* forbids.⁴⁸ In the 1987 case *Nollan v. California Coastal Commission*, a couple wished to build a house on their beachfront property.⁴⁹ The couple requested a coastal development permit from the California Coastal Commis-

³⁹ *Koontz*, 133 S. Ct at 2594.

⁴⁰ *Id.* at 2596.

⁴¹ *Id.* at 2596, 2603.

⁴² U.S. CONST. amend. V.

⁴³ Edward J. Sullivan, *A Brief History of the Takings Clause*, LAND USE LAW, http://landuselaw.wustl.edu/Articles/Brief_Hx_Taking.htm (last visited Jan. 24, 2014), available at <http://perma.cc/Y9QJ-JS9P>.

⁴⁴ *Id.*; see *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897).

⁴⁵ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

⁴⁶ 438 U.S. 104, 124 (1978); see Sullivan, *supra* note 43.

⁴⁷ *Penn Cent.*, 438 U.S. at 124.

⁴⁸ See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2604 (2013) (Kagan, J., dissenting) (explaining the applicability of *Nollan* and *Dolan*).

⁴⁹ 483 U.S. 825, 827–28 (1987).

sion, which would grant the permit only on the condition of a public easement grant.⁵⁰ According to the Commission, the Nollans and the previous property owners had previously allowed the public to traverse their property.⁵¹ The Commission sought to secure this right of way for beachgoers permanently.⁵² In declaring the easement condition to be an excessive exaction, the Supreme Court held that there must be a “nexus between the condition and the original purpose of the building restriction,” otherwise the condition becomes a taking.⁵³ The Court determined that the purpose of the county’s restriction on beachfront development lacked a sufficient nexus to the public access easement and therefore became a taking.⁵⁴

Seven years later, the Court again addressed the takings issue in *Dolan v. City of Tigard*.⁵⁵ Dolan owned a store on Main Street in Tigard, Oregon, and applied to expand her store and pave her parking lot.⁵⁶ The proposed development was within a floodplain, and consequentially the City Planning Commission agreed to approve Dolan’s permit only if she granted the city land for a public greenway to minimize flooding, as well as for a pedestrian plan designed to relieve traffic congestion.⁵⁷ The Court in *Dolan* held that in addition to the nexus relationship required by *Nollan*, the government may not condition a permit on certain requirements unless those requirements have a “rough proportionality” to the proposed development’s impact.⁵⁸ The Court held that to meet this rough proportionality test, “the city must make some sort of individualized determination” that the city’s condition “is related both in nature and extent to the impact of the proposed development.”⁵⁹ The Court found that the city’s requirements lacked the necessary rough proportionality between the required conditions and Dolan’s proposed building.⁶⁰

In *Lingle v. Chevron U.S.A. Inc.*, the Supreme Court synthesized *Nollan* and *Dolan* and noted that “[i]n each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking.”⁶¹ Several federal Court of Appeals

⁵⁰ *Id.* at 828.

⁵¹ Brief for Appellee at 4, *Nollan*, 483 U.S. 825 (No. 86-133).

⁵² *Nollan*, 483 U.S. at 828.

⁵³ *See id.* at 837, 842.

⁵⁴ *See id.* at 837, 842 (“[I]f [the Commission] wants an easement across the Nollans’ property, it must pay for it.”).

⁵⁵ 512 U.S. 374, 377 (1994).

⁵⁶ *Id.* at 379.

⁵⁷ *Id.* at 380, 380 n.2, 382.

⁵⁸ *See id.* at 391.

⁵⁹ *Id.*

⁶⁰ *See id.* at 394–95.

⁶¹ 544 U.S. 528, 546 (2005). In *Lingle*, the Court clarified precedent and concluded, “whether a regulation ‘substantially advances’ a legitimate state interest is *not* a constitutional test for the purposes of the Takings Clause” Sullivan, *supra* note 43; *see Lingle*, 544 U.S. at 548.

cases have considered the question of monetary exactions and determined that they fall under the purview of *Penn Central* rather than *Nollan* and *Dolan*.⁶² In 2008, the Ninth Circuit addressed the question in *McLung v. City of Sumner*.⁶³ In *McLung*, the plaintiffs protested a city requirement mandating the use of a certain size of storm pipe.⁶⁴ The McLungs claimed that the requirement constituted a monetary exaction that failed to meet the *Nollan* and *Dolan* standards.⁶⁵ The McLungs characterized the city requirement as a monetary exaction because they were forced to pay to have their storm pipes upgraded as a result of the regulation.⁶⁶ The Ninth Circuit rejected that argument and noted, “Even if the upgrade could be viewed as a monetary exaction for the cost of upgrading the storm pipe, however, *Nollan/Dolan* still would not apply. A monetary exaction differs from a land exaction— ‘[u]nlike real or personal property, money is fungible.’”⁶⁷ Although the Ninth Circuit did not expand on its reasoning, the court restricted the *Nollan/Dolan* analysis to real property.⁶⁸

III. ANALYSIS

In *Koontz v. St. Johns River Water Management District*, the U.S. Supreme Court considered the applicability of *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard* to monetary exactions.⁶⁹ The Court ultimately concluded that exaction of fees must be considered under the *Nollan* “nexus” test along with the *Dolan* “rough proportionality” requirement to determine whether a taking occurred in violation of the Fifth Amendment of the U.S. Constitution.⁷⁰

The Court determined that it was irrelevant that no property or funds were actually taken by the St. Johns River Management District (“the District”).⁷¹ According to the Court, it is not the actual taking of property that violates the

⁶² See, e.g., *Meade v. City of Cotati*, 389 F. App’x 637, 638–39 (9th Cir. 2010) (“A generally applicable development fee is not an adjudicative land-use exaction subject to the . . . tests of [*Nollan*] and [*Dolan*]. Instead, the proper framework for analyzing whether such a fee constitutes a taking is the fact-specific inquiry developed by the Supreme Court in [*Penn Central*].”); *McClung v. City of Sumner*, 548 F.3d 1219, 1228 (9th Cir. 2008); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) (“Based on a close reading of *Nollan* and *Dolan*, we conclude that those cases (and the tests outlined therein) are limited to the context of development exactions where there is a physical taking . . .”).

⁶³ 548 F.3d at 1228.

⁶⁴ *Id.* at 1222.

⁶⁵ See *id.* at 1228.

⁶⁶ *Id.*

⁶⁷ *Id.* (quoting *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989)).

⁶⁸ See *id.* The court devoted only one paragraph of its opinion to analyzing this specific issue, which was one of “several arguments” advanced by the plaintiffs. *Id.*

⁶⁹ See 133 S. Ct. 2586, 2603 (2013).

⁷⁰ *Id.*

⁷¹ *Id.* at 2596.

Takings Clause in land-use permitting, but rather the government's actions which "impermissibly burden the right not to have property taken without just compensation."⁷² A government, therefore, cannot evade the *Nollan* and *Dolan* requirements simply by demanding property as a condition precedent for permit approval, rather than as a condition subsequent.⁷³

The Court next considered the difference between a government conditioning permit approval on asking an applicant to spend money versus requiring the applicant to relinquish real property.⁷⁴ The Florida Supreme Court held that there was no taking because one of the District's proposed alternatives for *Koontz* was a monetary expenditure "rather than a more tangible interest in real property."⁷⁵ In rejecting the Florida court's finding, the U.S. Supreme Court noted that if requiring a payment could never be an impermissible exaction, governments might be able to circumvent constitutional barriers by requiring large sums of money in exchange for land-use permits, yet avoid *Nollan* and *Dolan* scrutiny.⁷⁶

The key to the Court's analysis is that the "monetary exactions" by the District in *Koontz* unconstitutionally burdened the applicant's property right.⁷⁷ The Court determined that the connection between the monetary condition and the property in question was a "direct link" sufficient to implicate a constitutional right, and should be tested under the land-use-permitting context of the *Nollan* and *Dolan* standards.⁷⁸

The Court's conclusion in *Koontz* unwisely expanded the intended scope of *Nollan* and *Dolan*.⁷⁹ The *Nollan/Dolan* decisions apply in the specific context of land-use permitting in which the government impermissibly conditioned a permit on the surrender of an interest in real property.⁸⁰ The *Koontz*

⁷² *Id.* at 2595.

⁷³ *Id.* The Court explained that it is irrelevant whether the permit was approved or denied. *Id.* at 2595. The nexus and proportionality requirements apply equally when, as was the case in *Koontz*, the government *denies* a permit because the applicant refused to relinquish property. *Id.*

⁷⁴ *Id.* at 2598.

⁷⁵ *Koontz*, 133 S. Ct. at 2599.

⁷⁶ *See id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 2600 ("Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.").

⁷⁹ *See id.* at 2603; *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005); *see also* Brief for Respondent at 24, *Koontz*, 133 S. Ct. 2586 (No. 11-1447).

⁸⁰ *See Lingle*, 544 U.S. at 547.

decision might also have a negative effect on the environment by limiting the number of tools available to regulatory bodies.⁸¹

The *imposition* of conditions found impermissible in *Nollan* and *Dolan* is hardly analogous to the *proposal* of conditions in *Koontz*.⁸² Finding *Koontz*'s original offset proposal unsatisfactory, the District suggested alternatives that would meet its mitigation standards.⁸³ It was only when *Koontz* rejected the proposed conditions *and* failed to offer acceptable alternatives that the District denied his petition.⁸⁴

This situation contrasts with the facts of *Dolan*.⁸⁵ In *Dolan*, the applicant challenged a city code that specifically laid out mitigation requirements for new developments, such as those of the petitioner.⁸⁶ The city planning board granted the applicant's permit subject to the city code's conditions.⁸⁷ In contrast, *Koontz* rejected both of the possibilities suggested by the District and subsequently declined to propose any alternatives.⁸⁸

Similarly, in *Nollan* the permit application was approved, but subject to a condition imposed by the city commission.⁸⁹ When the applicants were notified about the condition to their permit, they protested its imposition but lost the appeal, and the permit was granted subject to the condition.⁹⁰ The *Nollans* were not given the opportunity to present alternative offsets or choose from different mitigation options.⁹¹ In both *Nollan* and *Dolan*, the petitioners had mitigation conditions attached to approval of their permits without any sort of bargaining or choice.⁹² *Koontz* not only had two options to choose from, but these were merely suggestions, and the District was receptive to alternative proposals.⁹³

⁸¹ See Jeremy P. Jacobs, *Takings Decision Confounds Experts, Spurs Accusations of Judicial Activism*, GREENWIRE (June 26, 2013), <http://www.eenews.net/stories/1059983522>, available at <http://perma.cc/U3VQ-6JFB>.

⁸² See *Koontz*, 133 S. Ct. at 2593; *Dolan v. City of Tigard*, 512 U.S. 374, 379 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 828 (1987).

⁸³ *Koontz*, 133 S. Ct. at 2593.

⁸⁴ *Id.*; Brief for Respondent, *supra* note 79, at 38.

⁸⁵ See *Dolan*, 512 U.S. at 379.

⁸⁶ *Id.* at 379 ("Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain.").

⁸⁷ *Id.* at 379–80.

⁸⁸ See *Koontz*, 133 S. Ct. at 2593; Brief for Respondent, *supra* note 79, at 38.

⁸⁹ *Nollan*, 483 U.S. at 828.

⁹⁰ *Id.* ("The *Nollans* protested imposition of the condition, but the Commission overruled their objections and granted the permit subject to their recordation of a deed restriction granting the easement.").

⁹¹ See *id.*

⁹² See *id.*; *Dolan*, 512 U.S. at 379.

⁹³ *Koontz*, 133 S. Ct. at 2593.

In cases such as *Koontz*, the governmental body in question is admittedly burdening the applicant's property interest when it conditions use of that property (specifically, approval of a permit) on a monetary expenditure.⁹⁴ This does not necessarily move the Court's analysis from the *Penn Central* test, however, which protects generally against excessive governmental regulation of property, to the more specific *Nollan/Dolan* framework.⁹⁵ *Nollan* and *Dolan* have been limited to the "the special context of land-use exactions."⁹⁶

As the Supreme Court stated in *Lingle*, *Nollan* and *Dolan* rest on the premise that "had the government simply appropriated" the property interests subject to the contested conditions, it "would have been a *per se* physical taking."⁹⁷ Starting with that premise, it does not seem that the condition imposed in *Koontz* falls under the purview of the *Nollan/Dolan* test.⁹⁸ If *Koontz* had accepted the District's second mitigation proposal, the government would only have taken *Koontz*'s money, not any interest in real property.⁹⁹ As the Supreme Court has stated, "[u]nlike real or personal property, money is fungible."¹⁰⁰ The U.S. Court of Appeals for the Ninth Circuit agreed in *McClung*, noted the difference between money and real property, and concluded that a monetary obligation did not fit in the context of *Nollan* and *Dolan*.¹⁰¹ This does not mean that the exaction in *Koontz* is not a taking; the exaction's constitutionality should simply be tested under the *Penn Central* standards rather than the specific lens of *Nollan/Dolan*.¹⁰²

In applying the *Nollan/Dolan* standards to monetary expenditure conditions, the majority created potential practical ramifications on the local government level.¹⁰³ First, as the dissent suggested, the holding in *Koontz* might apply to a wide array of monetary payments besides land use exactions such as

⁹⁴ See *id.* at 2596.

⁹⁵ *Id.* at 2604 (Kagan, J., dissenting).

⁹⁶ See *Lingle*, 544 U.S. at 538, 546; see also *McClung v. City of Sumner*, 548 F.3d 1219, 1228 (9th Cir. 2008).

⁹⁷ *Lingle*, 544 U.S. at 546.

⁹⁸ See *Koontz*, 133 S. Ct. at 2604 (Kagan, J., dissenting); *Lingle*, 544 U.S. at 538, 546; see also *McClung*, 548 F.3d at 1228.

⁹⁹ See *Koontz*, 133 S. Ct. at 2593.

¹⁰⁰ *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989); see *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1340 (Fed. Cir. 2001) ("[T]he mere imposition of an obligation to pay money . . . does not give rise to a claim under the Takings Clause of the Fifth Amendment."); *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir. 1990) ("Requiring money to be spent is not a taking of property.").

¹⁰¹ See *McClung*, 548 F.3d at 1228.

¹⁰² See *Koontz*, 133 S. Ct. at 2604 (Kagan, J., dissenting); *Lingle*, 544 U.S. at 538, 546; see also *McClung*, 548 F.3d at 1228.

¹⁰³ See Anthony S. Guardino, *U.S. Supreme Court Divides Sharply in 'Koontz' Ruling*, N.Y.L.J. (July 24, 2013), <http://www.newyorklawjournal.com/id=1202612156904?slreturn=20140025001722>, available at <http://perma.cc/9HFL-LY3R>.

the one at issue in the case.¹⁰⁴ It remains to be seen how widely the *Koontz* decision will be applied to government imposed fees relating to property usage.¹⁰⁵

The Court's decision could also have a chilling effect on local land use permits and negative ramifications on the environment.¹⁰⁶ *Koontz* has a potential to make local officials overly cautious in approving and denying permits.¹⁰⁷ The legally safe route for dealing with development applications might become an outright denial rather than an attempt to condition appropriate mitigation.¹⁰⁸ Proposing alternative options for applicants, or negotiating proposals with them, could run the risk of exposing small communities across the country to costly litigation.¹⁰⁹

The perverse incentive created by the extension of *Nollan* and *Dolan* to monetary exactions could cause local governments to reject development proposals and thereby dry up income badly needed to combat environmental damage.¹¹⁰ Mitigation actions by landowners have a potential to help communities protect the environment while sustaining growth.¹¹¹ Rather than attempt to compromise, local land-use regulators might be left with two options: deny developments and the valuable mitigation resources that might come with them, or approve environmentally harmful developments without the imposition of any sort of conditions.¹¹²

CONCLUSION

The U.S. Supreme Court's decision in *Koontz v. St. John's River Water Management District* extends the scope of the *Nollan/Dolan* test to monetary expenditure conditions on land-use permits. Until the dust settles on *Koontz*, it is unclear what practical impact the decision will have. Ultimately, broadening the *Nollan/Dolan* protections might have a chilling effect on local land use permit approval and could have negative ramifications on environmental regulation by limiting the tools available to local regulatory bodies.

¹⁰⁴ See *Koontz*, 133 S. Ct. at 2607 (Kagan, J., dissenting).

¹⁰⁵ See *id.* The dissent conjectured that property-related fees such as those required by municipalities to provide sewage or to acquire a liquor license will be subjected to the *Nollan* and *Dolan* tests. *Id.*

¹⁰⁶ See John D. Echeverria, *A Legal Blow to Sustainable Development*, N.Y. TIMES (June 26, 2013), <http://www.nytimes.com/2013/06/27/opinion/a-legal-blow-to-sustainable-development.html>, available at <http://perma.cc/C5K8-YRLY>; Guardino, *supra* note 103.

¹⁰⁷ Echeverria, *supra* note 106; Guardino, *supra* note 103.

¹⁰⁸ Echeverria, *supra* note 106; Guardino, *supra* note 103.

¹⁰⁹ Guardino, *supra* note 103.

¹¹⁰ See Echeverria, *supra* note 106.

¹¹¹ See *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1230 (Fla. 2011).

¹¹² See *id.*; Echeverria, *supra* note 106.